

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1500

To be argued by
ALAN LEVINE

United States Court of Appeals **B**

FOR THE SECOND CIRCUIT

Docket No. 77-1500

UNITED STATES OF AMERICA,

Appellee, **P/L**

—v.—

FRED R. FIELD, JR.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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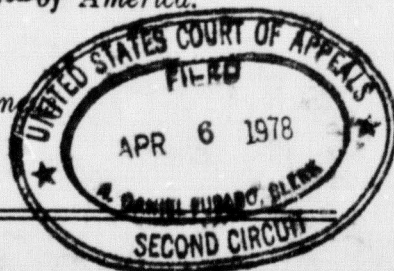


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Docket No. 77-1500

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRED R. FIELD, JR.,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Fred R. Field, Jr., appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on September 29, 1977, after an eight day jury trial before the Honorable Morris E. Lasker, United States District Judge.

Indictment S 76 Cr. 1117, a ten count indictment filed April 20, 1977, charged Field with labor racketeering, demanding and receiving illegal payments as a labor union official, conspiracy, tax evasion and filing false tax returns. Count One charged the defendant, an official of the International Longshoremen's Association, with engaging in a pattern of racketeering activity in demanding and receiving unlawful payments on seventeen occasions from September, 1968 through November, 1974, in violation of Title 18, United States Code, Section

1962(c).^{*} Counts Two through Five each charged the defendant with demanding and receiving four specified payments, in violation of Title 29, United States Code, Section 186(b). Count Six charged the defendant with conspiracy to commit the offenses set forth in Counts One through Five in violation of Title 18, United States Code, Section 371. Counts Seven and Nine charged the defendant with attempting to evade his personal income taxes for the tax years 1971 and 1974, respectively, in violation of Title 26, United States Code, Section 7201. Counts Eight and Ten charged the defendant with filing false personal income tax returns for the tax years 1971 and 1974, respectively, in violation of Title 26, United States Code, Section 7206(1).^{**}

Trial commenced on September 19, 1977, and concluded on September 29, 1977, when the jury returned guilty verdicts on all counts. On December 2, 1977, Judge Lasker sentenced Field to concurrent terms of one year imprisonment and two years' probation on each count and a \$5,000 fine on each count, totalling \$50,000.

^{*} Count One set forth three separate periods in which a series of payments were made: seven payments from September 1971 through December 13, 1971; seven payments from September 1968 through March 1969; three payments from October 1974 through November 1974.

^{**} The original indictment, 76 Cr. 1117 was filed on December 10, 1976, in three counts. It charged the defendant with engaging in a pattern of racketeering activity for the period 1968 through December 13, 1971, in violation of Title 18, United States Code, Section 1962(c), demanding and receiving an unlawful labor payment on December 13, 1971 in violation of Title 29, United States Code, Section 186(b) and conspiracy to violate those statutes in violation of Title 18, United States Code, Section 371. The superseding indictment, S 76 Cr. 1117, included these charges, but added the payments during 1974 and the tax counts set forth, *supra*.

Statement of Facts

A. The Government's Case

1. Overview

The proof at trial in this labor "shake-down" case showed that Fred R. Field, Jr., used his high position with the International Longshoremen's Association ("ILA") to obtain payments totalling \$124,500 from United Brands Company, a corporation engaged in the production and importation of bananas. Field demanded and received most of these payments in connection with longshoremen's strikes which occurred when the ILA negotiated its nationwide contracts in 1968-69 and 1971. Taking advantage of the economic loss which United Brands would suffer if its perishable bananas were not unloaded, Field demanded and received cash payments for each United Brands vessel unloaded by longshoremen during the strikes. In 1974 when the contract was renegotiated without a strike, Field exacted from United Brands an "insurance" payment for labor peace. Fred Field's contact and United Brands' conduit for the payments was Beverly Hachmann, who was the company's Manager of Personnel and Labor Relations. Of course, none of these cash payments was reported by Field on his personal income tax returns.

2. The 1968-1969 Strike Payments

In 1968 Fred Field was one of the top four officials of the International Longshoremen's Association. That union, comprised of more than 100,000 men, supplied the longshoremen who in various Atlantic and Gulf coast ports unloaded bananas for United Fruit, the predecessor

of United Brands Company. (Tr. 80-83).^{*} In addition to his national position as General Organizer Field was President of ILA Local 856, and President of the International Banana Handlers Council, which was composed of the various ILA locals throughout the country discharging bananas. As a result of holding these union offices, by 1968 Field had regular contact with Beverly Hachmann, United Fruit's Manager of Personnel and Labor Relations. (Tr. 80-82).

In the end of 1968 labor problems arose. On September 30, 1968 the contract governing ILA Atlantic and Gulf Coast Districts terminated and failing to reach agreement on a new three-year contract with management representatives, the ILA commenced a coastwide strike. Although the strike was temporarily aborted by an 80 day Taft-Hartley injunction, when that injunction expired on December 21, 1968, the strike recommenced. (Tr. 85-87).

Either shortly before September 30th or during the Taft-Hartley period, Field summoned Hachmann for a private meeting. (Tr. 88-89). During this meeting Field explained that United Fruit had "gotten a free ride" in the earlier strikes in that ILA labor had unloaded its perishable bananas in Southern ports, but that during this anticipated strike the banana vessels would not be unloaded unless Field received \$500 for each vessel unloaded. (Tr. 90). The money was to be delivered in cash. (Tr. 90). Hachmann replied that he lacked the authority

^{*} "Tr." refers to Trial Transcript; "GX" refers to Government Exhibit; "Br." refers to Appellant's Brief; "App." refers to Appellant's Appendix; "DX" refers to Defense Exhibit.

Of the company's bananas imported into the United States, as of 1968 approximately 65-70% of those bananas were unloaded in Weehawken, New Jersey and Baltimore, Maryland. The remainder was unloaded in various Atlantic and Gulf ports like Charleston, South Carolina, Tampa, Florida, Mobile, Alabama and New Orleans, Louisiana. (Tr. 84-85).

to make such a deal and that he would report it to the company's home office in Boston. (Tr. 90).

Hachmann travelled to Boston and discussed Field's demand with senior company officers, Wilbur Lauer, Vice President of Personnel, and Charles McCauley, then Assistant Vice President of Transportation. (Tr. 91, 560-62, 648-49). Hachmann explained to Lauer that Field could in fact stop the company's operations if the payments were not made, since local ILA leaders basically did what Field told them to do. (Tr. 92-95). In the face of Field's demand and the power Field wielded, company approval was given. A couple of days later Hachmann advised Field that the payments would be made. (Tr. 92, 560).

During the ensuing national strike, the company was able to unload its normal volume of bananas in several southern ports. (Tr. 96).^{*} In exchange, Hachmann paid Field cash sums according to the number of vessels unloaded. (Tr. 104). For each payment Hachmann obtained cash from the company's Vice President of Finance, Edward Gibbons, in Boston. (Tr. 97-98, 66-68). On the same day or the following day Hachmann paid Field in New York.^{**} The first payment was made in Field's car at La Guardia Airport upon Hachmann's arrival from Boston. (Tr. 103-03). The other payments were made in Field's apartment building or his private office. (Tr. 104-05). On each occasion they met in private. (Tr.

^{*} Hachmann testified that, as in previous strikes, longshoremen in the Northern ports of Weehawken and Baltimore did not unload perishable fruit and the ships normally destined for these ports were diverted to Southern terminals. (Tr. 84).

^{**} Hachmann did not recall the dates of the payments, however, Hachmann's travel records reflected his trips from Boston to New York during the period of the 1968 strike. (Tr. 98-99; 99-102; GX 1A).

105). Hachmann advised Charles McCauley after the payments were completed. (Tr. 850). By the strike's conclusion Field had received a total of \$41,000. (Tr. 97).

3. The 1971 Strike Payments

In 1971, as the life of the 1968 ILA contract drew to a close, negotiations commenced in New York City between shipping representatives and ILA leaders, including Field. (Tr. 106). Immediately before the contract's expiration, Field took time out from the negotiations at the Sheraton Motor Inn and once again summoned Hachmann to a private meeting. (Tr. 107).

On September 28, 1971, after Hachmann advised Lauer of the meeting, Hachmann travelled to New York and checked into the Royal Manhattan Hotel, nearby the Sheraton. (Tr. 107-09, 554-55; GX 1B). That evening Field broke away from the negotiations and met Hachmann in Hachmann's hotel room. (Tr. 113). Field reported that the negotiations were proceeding poorly and that a settlement was unlikely. (Tr. 113). In the event of a strike, Field stated, United Brands' bananas would not be unloaded unless he was paid a lump sum of about \$100,000 to \$125,000. (Tr. 113-14, 369). Hachmann protested that such an arrangement was unfair since it was unrelated to the length of the strike. (Tr. 114). After some discussion Field modified his demand and stated United Brands would be permitted to "work its ships" if he was paid \$500 per vessel unloaded in all ports except New Orleans where Field's price was \$1,000 per vessel. (Tr. 114). As in 1968, Hachmann said that he would consult United Brands' officers. (Tr. 114-15).

Upon his return to Boston, Hachmann discussed Field's proposal with Lauer and McCauley. (Tr. 118, 555-56, 651). Again, the company authorized the pay-

ments and Hachmann told Field that the payment would be made. (Tr. 119). On October 1, 1971 a coast-wide ILA strike began which continued until just after Thanksgiving. (Tr. 119). During this period United Brands' banana vessels were unloaded in several southern ports. (Tr. 120).

As in 1968, Hachmann paid Field regularly during the strike period in relation to the vessels unloaded by the ILA. Still, possibly several times Hachmann flew to New York City; Field received a total of \$48,500 for a total of 74 unloaded vessels. (Tr. 121).^{*} On each occasion Hachmann received the cash from Gibbons in Boston and departed for New York City either the day he received the money or shortly thereafter. (Tr. 123-24, 669).^{**} During 1971 Field received his cash payments in various places, including a passenger waiting room in La Guardia Airport and his private apartment on East 56th Street in Manhattan. (Tr. 160).

On one other occasion—described in detail for the jury and explored at length on cross-examination—Field

^{*} Of the 74 vessels, 23 (equalling \$23,000) were unloaded in New Orleans and 51 (equalling \$25,500) were unloaded elsewhere. (Tr. 123).

^{**} Gibbons testified that with respect to the 1971 strike payments he obtained the cash from the United Fruit division treasurer, Patrick Brangwynne. (Tr. 670). According to Brangwynne, on each occasion the cash—all \$100 bills—was generated by cashing a Cash Disbursement check on the date and in the specific amount requested by Gibbons. (Tr. 714-15). All the checks and stubs were received in evidence. (Tr. 515-26; GX 5A-5P).

Again, Hachmann did not recall the specific dates of his New York trips, however, his travel records reflected eight trips to New York during this period. A comparison of the Cash Disbursement checks with Hachmann's travel records corroborated his testimony that on almost every occasion he received the cash and, shortly thereafter, flew to New York. (Tr. 124; GX 1E-1F).

received approximately \$7,000 at the New York Hilton in Hachmann's hotel room at about midnight after he had been honored at a benefit dinner dance by Deborah Hospital. (Tr. 163-65). Earlier that day Hachmann had travelled to New York City with his wife and with approximately \$15,000 cash. (Tr. 164). In the middle of the social affair Hachmann returned to his hotel room and in approaching the room observed an individual running down the corridor away from his room. (Tr. 165). When Hachmann finally checked his suit pockets where the money had been left, about half of it had disappeared. (Tr. 167). Later that evening after he had requested his wife and guests to leave his room temporarily, Hachmann paid Field whatever cash was left and expressed his intention to make the final payment shortly.* (Tr. 168). On December 13, 1971, Hachmann completed the payments by giving Field approximately \$13,500. (Tr. 171, 670-72, 725-26; GX 50-5P).**

4. The 1974 Labor Peace Payments

In 1974, the ILA and management reached agreement on a new three year contract before the 1971 contract's expiration on September 30, 1974. On September 23, 1974

* Upon Hachmann's return to Boston, he immediately reported the incident to the Superior, Lauer, and offered to make up the lost money and/or resign. (Tr. 169-71, 558-60). Lauer refused to accept either offer and instead authorized Hachmann to obtain the balance of cash owed Field from the Vice President of Finance, Gibbons. (Tr. 171, 559).

** The December 13, 1971 payment was the subject of Count Two of the original and superseding indictments.

Several weeks after this payment, Gibbons obtained \$57,500 cash from a Panamanian subsidiary and delivered it to Brangwynne to reimburse the petty cash account for the monies given to Hachmann, which included the cash given to Field and the stolen cash. (Tr. 672-73, 730). The documents which reflected this transaction and which were prepared in the regular course of business were received in evidence. (Tr. 731-32; GX 5Q-5R).

—after the agreement was reached—at Field's request Hachmann flew to New York City and met Field for lunch at the Double Dolphin Restaurant, around the corner from Field's East 56th Street apartment.*

During lunch Hachmann and Field discussed problems common to the company and the ILA, including the extension of the local banana contracts. (Tr. 174-75). Toward the lunch's conclusion Field demanded \$35,000 from United Brands. Since it was common knowledge that an agreement on a new three year contract had been reached, Hachmann protested the demand and asked Field what explanation he was expected to give to company officers. (Tr. 175). Field replied that the \$35,000 was for "three years of peace." (Tr. 175). Hachmann testified that he got Field's message "pretty loud and clear," (Tr. 179), and that his understanding of the word "peace" was that any grievances or disputes would be resolved in accordance with the contract's provisions for arbitration and that there would be no wildcat strikes, slowdowns or other unauthorized interruptions in work. (Tr. 176).**

Upon Hachmann's return to Boston he reported Field's demand to his new boss, Donald Meltzer, Vice President of Finance and Administration. (Tr. 180-81, 768-69). It was agreed that John Taylor, the president of the United Fruit division, should be advised of the demand. (Tr. 181, 769). Taylor testified that Hachmann presented to him the demand of \$35,000 for labor peace and that when Taylor inquired to whom the money would be paid, Hachmann responded, "Freddy Field." (Tr. 840). Taylor explained that at that time he knew Field was a senior

* Hachmann's expense records for this date included an American Express charge receipt for lunch at the Double Dolphin. (Tr. 173-74; GX 1G).

** To explain the economic impact on United Brands of labor trouble which delayed the unloading of a ship causing bananas to rot, Hachmann testified that in 1974 the value of the cargo of an average banana vessel was \$300,000. (Tr. 178).

ILA official. (Tr. 840). Several days later Meltzer received approval from Taylor to give Hachmann the cash,* (Tr. 771-72, 841-42), but told Hachmann that the company would pay the cash in several installments. (Tr. 183). Hachmann telephoned Field with the news. (Tr. 183-84).

Three times in the fall of 1974 Hachmann made trips to New York City to convey cash to Field: on October 8, 1974 when \$10,000 was delivered, on November 12, 1974 when \$10,000 was delivered, and on November 21, 1974 when \$15,000 was delivered.** The cash—all \$100 bills—went from Meltzer to Hachmann to Field. (Tr. 776-79, 187).*** Each time Hachmann paid Field in his apartment building—first, in the building's mail room, next, in an elevator, and finally, in Field's apartment. (Tr. 187).****

5. The 1975 Field Telephone Call

In the spring of 1975 Hachmann learned that the company's Vice President of Finance was providing information about his cash transfers to Field to the

* According to Meltzer, Taylor also stated that he would advise Eli Black, Chairman of the Board of United Brands. (Tr. 772).

** These three payments were the subject of Counts Three through Five of the superseding indictment.

Hachmann's travel records indicated a fourth Boston to New York trip on November 17, 1974 and Hachman testified that the third payment was made on either November 17 or 21, 1974. (Tr. 190; GX1H-1J). However, Meltzer testified that he made the final delivery of \$15,000 cash on November 21, 1974. (Tr. 778).

*** Meltzer testified that he obtained the cash or portions of it on each occasion from a safe deposit box. The record of access to the safe deposit box reflected that Meltzer had gone to the bank on dates which corresponded to Hachmann's plane trips from Boston to New York. (Tr. 776-79, 1190; GX 6).

**** On the witness stand Hachmann made a detailed diagram of Field's apartment. (Tr. 190-92; GX 1L).

United States Attorney's Office for the Southern District of New York. (Tr. 194). A few months later, in August, 1975 Field telephoned Hachmann and said that he had heard from "people in Washington that United Brands' finance man was talking." Hachmann confirmed that "they were looking into everything I ever did." (Tr. 194-95). Field then said to Hachmann, "Don't forget Chink." Hachmann replied "We better not talk on the phone," but before hanging up Field repeated "Remember Chink, you know what I mean?" (Tr. 195). According to Hachmann, "Chink" was the nickname for Clarence Henry, an ILA labor leader from New Orleans, who had also received money from Hachmann on one occasion but who had died in 1974. Hachmann testified that he understood Field's advice to mean that if he had to explain what was done with the money, he should say that he gave it to Chink, not to Field. (Tr. 197).*

6. Field's Personal Tax Returns

Neither Field's 1971 nor 1974 personal income tax return declared as income the \$48,500 or \$35,000, respectively, that he received from Hachmann. Justin Rhodes, a certified public accountant, testified that he prepared Field's tax returns for 1971 and 1974 in Manhattan and that the preparation was based upon information which his office obtained from Field. (Tr. 881-83). Rhodes attested that the customary routine was for Field to visit his office for a review after the return was completed, and that thereafter it would be mailed to Field in New York. (Tr. 882-83). Both in 1971 and 1974 Field signed the form 1040 return and filed it with the Internal Revenue Service. (Tr. 884; GX 8A, 8B).

* Hachmann's handwritten notes of this telephone call were marked for identification and then offered in evidence by the defense. (Tr. 194, 492; GX 1K, DX B).

B. The Defense Case

The defense called five southern ILA leaders who testified that southern black ILA locals traditionally unloaded perishable cargo during coastwide strikes because they could not give up the earnings and because states' "right to work" laws would permit non-union labor to perform the work. (Tr. 918-32, 960-63, 998-1001, 1072-75, 1083-86).^{*} Each labor leader testified that the southern locals were historically independent, that Field had never given the respective official an order or direction and that, if he had, the labor leader would follow the dictates of his local. (Tr. 928-30, 964-65, 1002-03, 1076-77, 1086). However, on cross-examination the local President from Gulfport, Mississippi testified that when he wanted to induce a sister local in Gulfport to participate in a work stoppage he called Field in *New York* and it was Field who was "instrumental" in effectuating the stoppage. (Tr. 996).

The defendant also called Joseph Castro, a Brooklyn longshoreman who had attended the Thanksgiving 1971 affair honoring Field. Castro testified that he sat at the front table watching Field all evening and that Field had not left the ballroom once before 12:30 a.m. (Tr. 983-86).

C. Government's Rebuttal Case

In rebuttal, Hachmann's wife corroborated her husband's testimony that after receiving a phone call he had asked her and all the other guests to leave their

^{*} Called on behalf of the defendant were: John H. Raspberry, ILA International Vice-President, South Atlantic and Gulf Coast District; Wilson Evans, President, ILA Local 1303, Gulfport, Mississippi; Isom Clemon, ILA International Vice-President, Mobile, Alabama; Miles E. Billups, ILA International Vice-President, Hampton Roads, Virginia; and Arthur Wilson, President, ILA Local 1649, Wilmington, Delaware.

hotel room temporarily on the night of the Deborah dinner affair. (Tr. 1110). The Government also called Eddie Powell, a retired President of ILA Local 1759, Tampa, Florida, who effectively refuted defense witnesses' claims that Field was powerless to influence Southern locals. Powell testified that on two specific occasions in October, 1974, he called work stoppages solely because he was directed to do so by Field. (Tr. 1115-17).

POINT I

United Brands and Its Employees Were Properly Considered Co-Conspirators.

Defendant Field contends that the United Brands employees from whom he received the illegal labor payments were victims of his extortion and, therefore, as a matter of law, could not be his co-conspirators. Based on this theory Field contends that the District Court should have dismissed the conspiracy count and excluded hearsay statements of these co-conspirators. Defendant also complains that Judge Lasker failed to charge the jury on this point although no such charge was requested. These arguments are without merit.

Count Six charged that Field conspired with the United Brands Company and certain United Brands employees to violate 18 U.S.C. § 1962(c), the racketeering statute and 29 U.S.C. § 186(b), the Taft-Hartley statute. The evidence showed that Hachmann, Lauer, McAuley, Meltzer and others agreed to make unlawful labor payments to Field in order to obtain labor peace for United Brands. The proof established that Field demanded the money warning that no bananas would be unloaded if the money were not paid and that labor peace would be assured only if the money were paid. Thereafter, Field received cash on seventeen occasions from 1968 through 1974 totalling \$124,500; United Brands' bananas were unloaded in their normal amounts during two coastwide strikes and United Brands enjoyed "labor peace."

Field's contention that a victim of extortion could not be a co-conspirator was squarely rejected in Judge Friendly's thorough opinion in *United States v. Annunziato*, 293 F.2d 373 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961), a case not cited by Field. In *Annunziato*, a union representative who received unlawful labor payments from an employer argued that he and the employer did not share a common purpose and that hearsay statements by agents of the employer were therefore not in furtherance of a conspiracy. Rejecting this argument, Judge Friendly stated:

"We think . . . that an employer who makes or agrees to make a payment to an employee representative . . . is engaged in a criminal enterprise jointly with the recipient." 293 F.2d at 379-80.*

Thus, under *Annunziato*, a conspiracy to violate the Taft-Hartley statute encompasses schemes where union officials apply pressure to employers, who capitulate and make payments in violation of the statute. In spite of the economic pressure, the employer's decision to make the pay-off creates criminal liability under that statute and his agreement to pay to a union representative creates criminal liability for conspiracy to violate the statute.

Here, the Government's proof of a conspiracy between Field and the United Brands employees to make unlawful labor payments to Field was more than sufficient. Hachmann testified to the conversations in which Field demanded the money and then in each instance, Hachmann recounted the conversations with the respective United

* Similarly, in *United States v. Overton*, 470 F.2d 761 (2d Cir. 1972), *cert. denied*, 411 U.S. 909 (1973), this Court held that evidence of coercive behavior is relevant to prove a conspiracy to violate Section 186, noting that the statute "contemplates a 'situation in which an employee representative might resort to pressure to obtain payment by conduct that may be characterized as coercive'." 470 F.2d at 766, quoting from *United States v. Kramer*, 355 F.2d 891, 896 (7th Cir.), *vacated and remanded on other grounds*, 384 U.S. 100 (1966). See also *Arroyo v. United States*, 359 U.S. 419, 426 n.8 (1959).

Brands executive responsible for approving the payment. Following Hachmann's testimony, each United Brands executive testified to his conversations with Hachmann and the agreement to make the payments to Field.* Based on these facts and under the applicable law, the District Court properly admitted the statements of the United Brands employees as statements in furtherance of the conspiracy** and properly refused to dismiss the conspiracy count as a matter of law.***

* Those United Brands employees who participated in the actual approval of such payments to Field—Hachmann, Lauer, Meltzer, Gibbons and Taylor—all sought and received immunity. (Tr. 197-98, 562, 674-75, 782, 842-43).

** Field claims that the District Court "fobbed off" his objections to the hearsay testimony. (Br. 27). However, the trial judge properly ruled at the first such objection that "it is possible for the Court and for the jury to find that they were co-conspirators even if they were pressured into becoming co-conspirators. If that is the theory on which you claim that this is not admissible, it is overruled." (Tr. 116). Thereafter the Court received the hearsay statements subject to connection, with a proper instruction to the jury that "such statements are admissible only if that person actually is a co-conspirator" and "even if I do rule that you *may* consider such matters, you later will have to decide whether you believe Mr. Lauer was a co-conspirator or not." (Tr. 117) (emphasis added).

The hearsay, consisting essentially of Hachmann's statements to his United Brands superiors in seeking approval for payments to Field, would have been equally admissible as the authorized statements of an agent in that Hachmann was acting as Field's agent in these conversations. Fed. R. Evid., 801(d)(2)(c); *United States v. Iaconetti*, 540 F.2d 574, 576-77 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977).

*** This is a far different case than *United States v. Rosenblatt*, 554 F.2d 36, 39 (2d Cir. 1977), relied upon by appellant, in which a conspiracy conviction was reversed because the proof failed to establish that the defendant agreed with his co-conspirator (government witness) to commit the crime which was the object of the conspiracy. In fact, this Court noted that the defendant "had no knowledge of (his co-conspirator's) plan." 554 F.2d at 39. Here there was no lack of agreement or common purpose to violate the Taft-Hartley Act by arranging for illegal labor payments to Field.

[Footnote continued on following page]

Field argues in the alternative that Judge Lasker erred in failing to instruct the jury "that, if the ability of United Brands to resist defendant was so substantially impaired that payments to defendant were unavoidable, the witnesses were not to be considered co-conspirators." (Br. 36). The claim is fundamentally defective. Despite numerous opportunities, defendant never asked that such an instruction be included in the court's charge and never objected to its omission. Fed. R. Crim. P. 30; *United States v. Pastore*, 537 F.2d 675 (2d Cir. 1976); *United States v. Santiago*, 528 F.2d 1130, 1135 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Pravato*, 505 F.2d 703, 704-05 (2d Cir. 1974); *United States v. Pinto*, 503 F.2d 718, 723 (2d Cir. 1974); *United States v. Projansky*, 465 F.2d 123, 135 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *United States v. Indiviglio*, 352 F.2d 276, 279-80 (2d Cir. 1965), (*en banc*), *cert. denied*, 383 U.S. 907 (1966). In fact, immediately before the charge, defense counsel requested Judge Lasker to delineate in his charge the particular United Brands witnesses who were co-conspirators. When the court replied, "I am not going to do it because it is still up to the jury to determine whether or not they find these people to be co-conspirators," defense counsel persisted, arguing that, "It is the Government's contention that they are conspirators." (Tr. 1306-07, 1317).

At this stage in the trial, the defense strategy was clear. Field specifically sought and received a charge "on the caution with which to regard the testimony of co-conspirators." (Tr. 1306, 1317). In doing so, the de-

Field cites other cases which do not even arguably raise these same issues. In each case a conspiracy count was dismissed on appeal because the Government adduced insufficient evidence of a particular conspirator's participation as opposed to any lack of common illegal purpose. *United States v. Holder*, 560 F.2d 953, 957 (8th Cir. 1977); *United States v. Varelli*, 407 F.2d 735, 749 (7th Cir. 1969); *Morei v. United States*, 127 F.2d 827, 831 (6th Cir. 1942).

fendant's primary interest was to tar the credibility of co-conspirators whose testimony would have to be "scrutinized carefully." Consistent with this approach, defense counsel chose to ignore Judge Lasker's express invitation to argue his "victims can't be conspirators" theory to the jury, (Tr. 1147), and instead summed up on the theory that the United Brands employees, far from being the victims, were the thieves. Similarly, Field registered a post-charge complaint about the court's failure "to define what a co-conspirator is" which defense counsel conceded he raised only "because I don't think you included all the names of the alleged co-conspirators. I think you excluded certain names. . . ." (Tr. 1344-45). Upon being persuaded that all co-conspirators had been named, counsel withdrew his objection. (Tr. 1346). The failure to seek the instruction that victims cannot be co-conspirators, the absence of which is now labeled error, was clearly the result of counsel's "deliberate tactical decision" to have the United Brands witnesses regarded as co-conspirators in an effort to limit their credibility, and Field "must be bound by the tactical choice." See *United States v. McKenzie*, 409 F.2d 983, 986-87 (2d Cir. 1969).

POINT II

The Trial Court's Supplemental Instruction To The Jury Was Proper.

Field argues that in responding to a question by the jury during its deliberations the trial court committed error by charging the jury that it would be an offense under Counts Two through Five, the Taft-Hartley charges, to demand money. Although he does not argue that the District Court misstated the law, Field contends that this instruction prejudiced him by altering the theory under which the case was tried.

Counts Two through Five of the indictment charged, in the conjunctive, that the defendant unlawfully did

"request, demand, receive and accept payments" in violation of Title 29, United States Code, Section 186(b).^{*} The statute provides, in the disjunctive, that it shall be unlawful to "demand . . . or receive payments."^{**}

* Counts Two Through Five charged as follows:

COUNTS TWO THROUGH FIVE

The Grand Jury further charges:

On or about the dates hereinafter set forth, in the Southern District of New York, Fred R. Field, Jr., the defendant, being then and there an officer and employee of labor organizations, to wit, the International Longshoremen's Association and other labor organizations related to and affiliated with the International Longshoremen's Association, which represented employees of employers who were employed in industries affecting commerce, unlawfully, wilfully, and knowingly did request, demand, receive and accept payments and deliveries of money from employers, to wit, the United Brands Company, the United Fruit Company and subsidiaries of said companies.

<i>Count</i>	<i>Approximate Amount</i>	<i>Approximate Date</i>
Two	\$15,000	December 13, 1974
Three	\$10,000	October 8, 1974
Four	\$10,000	October 21, 1974
Five	\$15,000	November 12-21, 1974

(Title 29, United States Code, Section 186(b).)

^{**} Section 186(b) reads as follows:

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

Section 186(a) reads as follows:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver,

[Footnote continued on following page]

With respect to those counts the Government's evidence established that Field utilized his position in the ILA to demand and to obtain from United Brands a total of \$124,500. Field defended against these charges by contending that he neither demanded nor received any money. Specifically, the defense was that all the evidence of demands and payments came from Beverly Hachmann, who probably took the money himself and therefore fabricated these charges against Field to hide his own theft. (Tr. 61, 63, 1232-33, 1250-51). Obviously, then, both the Government and the defense fought the case as one of all or nothing. Either Hachmann was telling the truth and Field both demanded and received the money or Hachmann was lying and the conversations and meetings with Field never took place.

Prior to the District Court's charge to the jury, the Government submitted and served on the defendant its Requests to Charge, including requests which stated, in the disjunctive, that the offense charged in Counts Two through Five was committed if the defendant demanded or received money. (Government's Request to Charge Numbers 11, 13 and 15). Perhaps believing that if the jury found demands it would also find payments, Field submitted no alternative charge on these counts, nor did he object at the charging conference when the District Judge indicated that in substance he would be using the requests submitted by the Government. (Tr. 1143-44).^{*} Accordingly, the District Court instructed that in order to find the defendant guilty beyond a reasonable doubt on Counts Two through Five, it must find that the de-

or agree to pay, lend, or deliver, any money or other thing of value—

- (1) to any representative of any of his employees who are employed in an industry affecting commerce.

^{*} Defense counsel raised several other specific objections to the Government's requests to charge on Counts Two through Five. (Tr. 1144-45).

fendant demanded, received or accepted money from Hachmann. (Tr. 1331-34). In fact, during the instructions on these counts the following colloquy took place:

ALT. JUROR No. 2: "I was—did you say demand, receive or accept?"

THE COURT: "Yes."

ALT. JUROR No. 2: "In other words can we conclude that he might have demanded and not received?"

THE COURT: "You have to be guided by what you find to be the facts of the case, but I am pointing out to you that the statute makes it an offense to demand \$1 as well as to receive it or accept it." (Tr. 1334).

Defense counsel took no objection whatsoever to these instructions.

After the jury's deliberations began, the Court received a note asking if the defendant would be guilty under Counts Two through Five if he demanded but did not receive the payments. Although he never previously suggested that the District Court was incorrect in charging, as it had, that a demand was sufficient, the defendant attempted to make the most of the opportunity presented by the note and urged the Court to charge that receipt of the money was necessary for conviction. To support his request defense counsel initially urged that the statute required a finding of both demand and receipt. (Tr. 1387-88). The District Court noted, in response, that the statute used the word "or." (Tr. 1388). Finally, defense counsel argued that if the jury were told that a demand was sufficient to violate the statute, a variance would be created between the charge and the Government's theory of the case. (Tr. 1389). In an effort to meet this argument by the defense, Judge Lasker proposed that he would charge that as a matter of law a defendant could be found guilty under the statute for merely de-

manding money but that the Government contended that in this case the defendant actually received the money. (Tr. 1396). Defense counsel described the Court's proposal as "Solomonic," * although he preserved his objection "for the record." (Tr. 1397). The Court then delivered its response to the note, consisting of a restatement of its initial charge on the statute with the added comment that the Government contended that "it has proved beyond a reasonable doubt that Mr. Field received and accepted the money." **

* The transcript reads "solomic."

** The Court's instructions to the jury were as follows:

The Court: . . . I have received your note, which I have marked as Court Exhibit 4, and I will read it so we know what the question is.

"Re Counts 2 through 5.

"Could he have demanded and not received but still be guilty, or does he have to demand and receive?"

Then one of you added:

"Indictment reads demand receive and accept payments. Is the law demand, receive or accept payment? Clarify words and/or."

Before I answer the question, I may say, first of all, that I complement all of you on your very sharp attention to the issues before you and I wondered whether any of you had gone to law school or are planning to do so, but you have asked a very good question.

"The answer to the question is that the law reads that it is an offense to demand or accept or receive.

The indictment charges that Mr. Field demanded and accepted and received.

Now, it is legally possible to find a defendant guilty—let me put it this way:

It is an offense, I won't say to find him guilty because there are other things, but it is an offense merely to demand. However, in this case, as you know, the government contends that it has proven beyond a reasonable doubt that Mr. Field received and accepted the money.

Have I answered your question? If not, would you raise your hand if there is anything further you would like to ask me.

Nobody is raising their hand, so I assume I have answered the question you had in your mind.

Thank you very much, ladies and gentlemen. Will you return to your deliberations. (Tr. 1399).

On this record, the defendant now urges that the supplemental instruction was unfair since it permitted conviction on a theory which was different from the Government's theory at trial.* The first answer to this claim is that Field waived any objection to the supplemental instruction. Although Field created a record of objection at the time the District Court responded to the note, this was far too late a point to raise this contention. By this juncture, the District Court had previously instructed the jury, without objection, that a demand was sufficient. The District Judge could not be expected to tell the jury the contrary in a supplemental charge, particularly in view of the fact that the law supported the charge previously given.

However, even apart from the fact that Field failed to raise a timely objection, Field's claim lacks any legal support. Although the indictment charged that Field both demanded and received payments, the statute, which defense counsel surely read before trial, obviously permitted conviction for a mere demand. The drafting of the indictment in the conjunctive represented no more than the Government's usual practice of drafting indictments so that it will be permitted to prove any of the acts made criminal by a statute. The well-settled and familiar law is that "indictments worded in the conjunctive charging violations of statutes worded in the disjunctive, can be supported by proof of either conjoined means of violating the act." *United States v. Cioffi*, 487 F.2d 492, 499 (2d Cir. 1973); see *United States v. Ricciardi*, 357 F.2d 91 (2d Cir. 1965), *cert. denied*, 385 U.S. 814 (1966); *United States v. Dranow*, 307 F.2d 545 (8th Cir. 1962); *Kitchens v. United States*, 272 F.2d 757 (10th Cir. 1959), *cert.*

* In the face of the plain language of the statute, Field has apparently abandoned his argument that the statute required both demand and receipt of payment. See also *United States v. Kramer*, *supra*.

denied, 362 U.S. 942 (1960); *United States v. DiSalvo*, 251 F. Supp. 740 (SDNY 1966). The District Judge exhibited his awareness of this principle by charging as he did.

A further complete answer to this argument is that the jury had to find the receipt of payments since it convicted on Counts Seven and Nine, the tax evasion charges. Field anticipates this argument and tries to fend it off by suggesting that the jury could have convicted on the tax counts by finding that only selected payments were made. (Br. 40). However, this argument overlooks the fact that the proof as to each of the payments came from the same main witness, Hachmann, with essentially the same corroboration. Since the defense's denial did not differentiate between payments, the jury had no basis to find one payment was made and another was not. Therefore, the jury's verdict reflects that it did finally determine that the payments were made and the supplemental instruction was, in the end, beside the point.*

POINT III

Evidence of Venue In The Southern District of New York For Counts Eight and Ten Was Sufficient.

Field next argues that the Government failed to establish venue in the Southern District of New York with respect to Counts Eight and Ten, which charged Field with

* Field also argues that a mere demand of money would not be a proper basis for conviction on Count One, the racketeering charge under 18 U.S.C. § 1961 and 1962. Field cites no law supporting this argument and, in any event, it is also beside the point. The jury's note sought instructions solely as to Counts Two through Five and the Court's instruction responded solely with respect to those counts. As Field's brief reveals, the only charge given as to Count One required the jury to find payments, not mere demands. (Tr. 1324-25).

making and subscribing false personal income tax returns for the years 1971 and 1974, respectively, in violation of 26 U.S.C. § 7206.* Field concedes that the relevant personal income tax returns were prepared in the Southern District of New York, but asserts that the Government was in addition, required to prove that the returns were subscribed in the Southern District.

Field makes this argument by reading *United States v. Slutsky*, 487 F.2d 832, 838-39 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974), as holding that a false tax return, charged under § 7206, must be both made *and* subscribed in the Southern District of New York for venue to be proper. In fact, Field misreads *Slutsky*. In *Slutsky* this Court applied the continuing offense statute, 18 U.S.C. § 3237,** in finding that proof of making and subscribing to a return in the district sufficiently established venue for an offense under § 7206. The Court went on to state that the making and subscribing of the returns had been charged in the Southern District of New York and therefore venue was proper. The Court did not state that if the returns were prepared but not signed in the District, venue would be improper.

* Section 7206 provides as follows:

Any person who—

(1) Declaration under penalties of perjury.

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

** Section 3237(a) provides as follows:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

In a more recent opinion, which Field's brief fails to mention, this Court found that venue would be proper under § 7206 if the return was "prepared and/or signed" in the district. In that case, *United States v. King*, 563 F.2d 559 (2d Cir. 1977), the defendant claimed that the Government failed to establish venue where the return listed the defendant's mailing address in the district, but other proof at trial showed that he resided and filed outside the district. This Court found that the mailing address on the return, and the fact that the defendant's wife resided in the district at that address, provided a sufficient basis for concluding "that the return was prepared and/or signed" in the district. 563 F.2d at 562.

Here, Field concedes that the returns were prepared in the Southern District of New York. This was established by the testimony of Field's accountant. (Tr. 881-83). Under *King*, this preparation in the district satisfied the venue requirement.

However, assuming *arguendo* that the Government was required to show that the returns were not only prepared but also signed in the Southern District of New York, there was ample circumstantial evidence establishing this point. First, each return listed Field's Manhattan apartment as his mailing address. (GX 8A, 8B). Second, his accountant testified that the final version of each return was reviewed with Field in Manhattan and then mailed to that Manhattan apartment for Field's signature and filing. (Tr. 885). Finally, extensive evidence was offered that Field spent a significant amount of time in New York; the evidence established that Field's principal office was at ILA headquarters in Lower Manhattan and that only from "time to time" did his accountant have to contact Field at his Miami residence or elsewhere. (Tr. 105, 883, 895-97). Particularly in view of the fact that the Government need only establish venue by a pre-

ponderance of the evidence, *United States v. Leong*, 536 F.2d 993, 996 (2d Cir. 1976), this circumstantial evidence exceeded that found to be sufficient in *United States v. King*, *supra*, and more than met the burden of proving venue as to Counts Eight and Ten.

POINT IV

The Racketeering Statute and the Taft-Hartley Statute Charge Separate Crimes and the Counts Charging These Crimes Were Not Multiplicitous.

Field next argues that Count One, the racketeering count and Counts Two through Five, the unlawful labor payments counts, were multiplicitous. However, no such claim was made pre-trial as required pursuant to Rule 12, Fed. R. Crim. P., and in any event, the statutes clearly require different elements of proof. Therefore, this argument is frivolous.

First, this claim of multiplicity of counts was waived by Field's failure to make a timely motion raising the issue in the District Court. Despite a plethora of motions attacking the original indictment, constitutional and otherwise, (App. 12a-23a), Field made no pre-trial motion claiming that the original indictment or the superseding indictment suffered from multiplicity. Although Field raised the claim in the Rule 30 conference as the District Court was preparing to charge the jury, by then the issue had been waived under Rule 12(f), Fed. R. Crim. P., which specifically provides that "[f]ailure . . . to raise . . . objections (to the indictment) which must be made prior to trial . . . shall constitute waiver there-

of." * Accordingly, the issue has been waived and cannot be reviewed on this appeal. *United States v. Private Brands*, 250 F.2d 554, 557 (2d Cir. 1957), *cert. denied*, 355 U.S. 957 (1958); see *United States v. Galgano*, 281 F.2d 908 (2d Cir. 1960), *cert. denied*, 366 U.S. 967 (1961).

In any event, since the two statutes clearly required a separate element of proof, the respective counts here were not multiplicitous. Field correctly notes that the proof of the unlawful labor payments in Counts Two through Five became part of the "pattern of racketeering activity" described in Count One, but he incorrectly asserts that the racketeering count, therefore, depended upon identical proof as Counts Two through Five. (Br. 46). Where the evidence required to support a conviction is not the same under both statutes, no multiplicity exists. *Milanovich v. United States*, 365 U.S. 551, 554 (1961); *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

Here the statutes have different elements. Section 186(b) of Title 29, United States Code, makes it unlawful for a labor union official to demand or receive any money from an employer. While it is true that such a crime constitutes a predicate offense included within the definition of "racketeering activity", 18 U.S.C. § 1961 (1)(B), to convict under § 1962(c) the prosecution is required to establish that such an official conducts his

* Rule 12(b), Fed. R. Crim. P., provides in pertinent part:

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

* * * * *

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings);



union's affair through a "pattern of racketeering activity." Under § 1961(5) a "pattern of racketeering activity" requires at least two such predicate offenses.* Both the statute's legislative history ** and applicable case law demonstrate that the Government must establish that the predicate offenses are connected by some common plan or scheme. *United States v. White*, 386 F. Supp. 882, 883 (E.D. Wisc. 1974); *United States v. Stofsky*, 409 F. Supp. 608, 617-18 (SDNY 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 425 U.S. 902 (1976). This interrelationship between predicate offenses is an element of proof under the racketeering count separate and distinct from the proof required under the individual Taft-Hartley counts.*** The jury was appropriately instructed

* Section 1961(5) provides in pertinent part:

"Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity.

** The Senate Judiciary Committee Report to the Senate stated: "The concept of 'pattern' is essential to the operation of the statute. . . The target of [this section] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S. Rep. 91-617, 91st Cong., 1st Sess. p. 138.

*** In a different but not unrelated context, this Court has concluded that § 1962(b), a sister clause of the applicable section here and using the same definition of "racketeering activity", created a "separate and wholly independent crime" from the predicate offenses which constitute "racketeering activity." *United States v. Parness*, 503 F.2d 430, 441 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). In *Parness*, this Court rejected the argument that the definition of "racketeering activity" was void for vagueness because it was defined "in terms of an 'act which is indictable,' rather than one which violates the incorporated criminal statutes." 503 F.2d at 441. It was reasoned that an indictment for the particular predicate offense was not a condition precedent to a prosecution under that section.

that it must find this additional element with respect to Count One. (Tr. 1325). Therefore, no multiplicity exists.

Moreover, this result is entirely consistent with the legislative history created at the time of the enactment of the Organized Crime Control Act of 1970, 18 U.S.C. § 1961 *et seq.* Specifically addressing itself to the question of whether the racketeering statute and its predicate offenses would be separate offenses, the submission by the Department of Justice, Office of the Deputy Attorney General to the Senate Judiciary Committee noted that under the provisions of § 1962(b) and (c) "multiple violations of [the predicate offenses] involved in the proof under [these sections] may be treated as a separate offense." S. Rep. 91-617, 91st Cong., 1st Sess. p. 126.

Thus, in light of this legislative history and in view of the fact that the racketeering statute and the unlawful labor payment statutes have different elements of proof, Field's claim of multiplicity must be rejected, even apart from his waiver of the claim.

POINT V

Sentences On Counts Eight and Ten Were Proper.

Field also seeks to vacate the convictions and sentences on Counts Eight and Ten on the ground that these false statement counts merge with the respective convictions for tax evasion and, therefore, the separate fines of \$5,000 imposed on both Counts Eight and Ten were improper. This contention is without merit.

Field correctly recites the settled law in this Circuit that upon conviction for violations of 26 U.S.C. § 7201 and a related lesser included offense, like § 7206, arising out of the same tax return, the cumulative imprisonment and/or fines imposed may not exceed the maximum possible fine under the greater offense charged, § 7201.

United States v. Slutsky, *supra*, 487 F.2d at 844-45; *United States v. White*, 417 F.2d 89, 93-94 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); cf. *Jeffers v. United States*, 432 U.S. 137 (1977). However, Field conveniently forgets to cite *United States v. Cramer*, 447 F.2d 220 (2d Cir. 1971), a case which demonstrated that if the total fines imposed do not exceed the maximum on the greater offense, there is no basis for vacating any of the convictions or the sentences. Here, the trial court imposed concurrent terms of imprisonment and probation on all ten counts and a \$5,000 fine on each separate count. Thus, cumulative fines on each of the two related tax counts do not exceed the \$10,000 maximum fine permitted under § 7201. This is entirely proper under *United States v. Cramer*, *supra*, and, accordingly, the convictions and sentences should not be disturbed.*

POINT VI

The District Court's Sentence On Count Six Was Proper.

Field now contends for the first time that his sentence on the conspiracy count, Count Six, should have been limited to the maximum penalties under the Taft-Hartley

* Field suggests in passing the trial court should not have submitted the two lesser included offenses to the jury. However, *United States v. White*, *supra*, and its progeny are clear that the offenses are properly submitted to the jury and that the convictions and sentences are only set aside in the event of an "unauthorized pyramiding of penalties." *United States v. White*, *supra*, 417 F.2d at 93.

In addition, Field speculates that the convictions on the two lesser included offenses could prejudice his opportunities for parole. However, the two quantitative calculations relied upon by the Board of Parole are unrelated to the number of counts for which the defendant is convicted. The "offense severity" rating is determined in the Parole Guidelines by the nature of the crime and income tax evasion is subclassified by the amount of evasion. 28 C.F.R. § 2.20. The "salient factor" score relates exclusively to the defendant's background. 28 C.F.R. § 2.20.

statute, 29 U.S.C. § 186, rather than the maximum penalties of the racketeering statute, 18 U.S.C. § 1962(c). Field argues that the verdict on Count Six must be read as a finding that he conspired to commit no more than the misdemeanor offense under § 186 and, therefore, his sentence should not exceed the penalty for that offense.*

This argument comes very late in the proceedings. When Field had the opportunity to request a special verdict on Count Six, to determine whether the conviction was for conspiring to commit the misdemeanor under § 186 or the felony under § 1962(c), or both, Field made no mention of the issue. Similarly, at sentencing, Field never requested that his sentence on Count Six be limited to the misdemeanor penalty. Accordingly, he waived any right to raise the issue before this Court. *United States v. Fuentes*, 563 F.2d 527, 531 (2d Cir. 1977); *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, 431 U.S. 959 (1977), and cases therein.

Field's failure to raise the issue in the District Court also precludes his reliance on *United States v. Quicksey*, 525 F.2d 337, 340-41 (4th Cir. 1977). In *Quicksey*, the defendants were convicted of conspiring to violate both 18 U.S.C. § 1952 and 21 U.S.C. § 841(a)(1). Both before the jury was charged and before the defendants were sentenced, the defendants asserted that they could not be punished under the maximum penalties of conspiring to

* Count Six of the indictment charged that the defendant conspired to violate both 18 U.S.C. § 1962(c) and 29 U.S.C. § 186(b). A violation of section 1962(c) is punishable by a maximum term of twenty years' imprisonment or a maximum fine of \$25,000 or both. 18 U.S.C. § 1962(a). A violation of section 186(b) is punishable by a maximum term of one year imprisonment or a maximum fine of \$10,000, or both. 29 U.S.C. § 186(d). On Count Six Field was sentenced to one year imprisonment and two years' probation to run concurrent with Count One and a \$5,000 fine. Thus, the two years' probation exceeded the maximum penalties under § 186.

violate 21 U.S.C. § 841(a)(1) in the absence of a special verdict. The Fourth Circuit held that in the absence of the special verdict which the defendants had requested, it was not possible to ascertain whether the jury intended to convict the defendants of conspiring to violate either or both acts. However, *Quicksey* does not suggest that a defendant can refrain from requesting a special verdict and then attempt to get the benefit of a favorable special verdict which he declined to seek.

This same point is emphasized by this Court's decision in *United States v. Galgano, supra*. In that case, the defendant was convicted for conspiring to violate a variety of narcotic felonies with different maximum penalties. No request for a special verdict was made in the district court. When an application was first made at the time of sentence that the defendant could not be sentenced under the maximum penalties for the more severe felony, 21 U.S.C. § 174, Judge Weinfeld denied the application concluding that the evidence at trial conclusively established the conspiracy to violate 21 U.S.C. § 174 and the jury's general verdict must be read as interpreting nothing less. *United States v. McKenney*, 181 F. Supp. 143, 146 (SDNY 1959), *aff'd sub nom. United States v. Galgano, supra*. In the absence of a special verdict this Court concluded that no defense was offered which would rationally permit a verdict of guilty under the statute which imposed the lesser penalty, but not under the statute which imposed the greater penalty. 281 F.2d at 911-12.

Not only did Field fail to make an application for a special verdict on the conspiracy count, but as in *Galgano*, the crux of the conspiracy alleged and proved was one to violate the statute with the greater penalty, here the racketeering statute. Field argued an "all or nothing" defense, claiming that none of the payments took place and the money was embezzled by Hachmann and the other United Brands employees. The guilty verdicts on all counts, including on the substantive count charging Field with the felony under § 1962, leaves no ambiguity as to

the meaning of the conviction on the conspiracy count. Thus, even if Field had raised the point to Judge Lasker he would not have been entitled to be sentenced on Count Six as though he were merely convicted of conspiring to commit the misdemeanor offense.

POINT VII

Section 1962(c) of Title 18, United States Code, Does Not Violate The *Ex Post Facto* Clause of the Constitution, Nor Does Count One Violate The Statute of Limitations.

Field argues that the racketeering statute, 18 U.S.C. § 1962(c), is violative of the *ex post facto* clause, Article 1, Section 9, clause 3,* since it punishes conduct which occurred before the effective date of the statute, October 15, 1970. He also contends that the racketeering count, Count One, violates the statute of limitations because included within it as predicate offenses are unlawful labor payments which took place more than five years before the date of the filing of the indictment. Both contentions, ruled upon in Judge Lasker's thorough pre-trial opinion below, (App. 17a-21a), are without merit.

The Constitution's *ex post facto* clause prohibits a law which "makes an action done before the passing of the law, and which, was innocent when done, criminal; and punishes the action," or which "aggravates a crime, or makes it greater than it was, when committed," or which "changes the punishment; and inflicts greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 Dall. 386, 390 (1798). Field

* Constitution of the United States, Article 1, Section 9, Clause 3 provides:

"No Bill of Attainder or ex post facto Law shall be passed."

points out that an unlawful labor payment, which occurred prior to October 15, 1970 was punishable by a maximum one year imprisonment and/or \$10,000 fine, whereas racketeering in violation of 18 U.S.C. § 1962(c) is punishable by a maximum 20 years' imprisonment and/or \$25,000 fine. Therefore, according to Field, when unlawful labor payments become predicate offenses under § 1962(c), Congress is inflicting greater punishment on acts which constituted preexisting crimes.

Field's fundamental mistake is in equating the commission of a single violation of 29 U.S.C. § 186(b) with the offense defined in 18 U.S.C. § 1962(c). As Judge Lasker noted below, "[s]ection 1962(c) creates a separate and distinct crime, comprised of the commission of at least two previously defined illegal acts, which is not complete until the second act is done." (App. 18a). By statutory definition, the second act which is necessary to constitute a § 1962 offense must take place after the effective date of the statute, October 15, 1970. 18 U.S.C. § 1961(5). Specifically seeking to avoid the *ex post facto* clause, Congress defined the offense so that one who has committed *an act* of racketeering, e.g., one unlawful labor payment, before the statute was enacted is on notice that the commission of an additional offense will constitute a separate crime.* *United States v. Campanale*, 518 F.2d 352, 361 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *United States v. Mandel*, 415 F.

* The Senate Judiciary Committee in its report to the Senate on the proposed law stated:

"One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against *ex post facto* laws, and bills of attainder. Anyone who has engaged in the prohibited activities is on prior notice that only one further act may trigger the increased penalties and new remedies of this chapter. S. Rep. 91-617, 91st Cong., 1st Sess. at 158."

Supp. 997, 1022 (D. Md. 1976).^{*} Consequently, section 1962(c) does not punish the commission of one § 186(b) offense committed before 1970; rather, the statute punishes the commission of two such offenses in a pattern.^{**}

Field also contends that the racketeering count contravened 18 U.S.C. § 3282, the five year federal statute of limitations for noncapital offenses, since the predicate

^{*} The *ex post facto* cases upon which Field relies are completely inapposite. *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (violation of *ex post facto* clause to find defendants violated city ordinance judicially expanded to include their conduct after that conduct was complete); *United States v. Sherpiz Inc.*, 512 F.2d 1361, 1365 (D.C. Cir. 1975) (1973 prosecution for conspiracy to violate obscenity laws during 1971 and 1972 may not rely upon Supreme Court's subsequently expanded definition of "obscenity"); *United States v. Henson*, 486 F.2d 1292, 1305 (D.C. Cir. 1973) (evidentiary provision expanding means of impeaching witness after conduct complete affects substantive rights and violates *ex post facto* clause).

^{**} In *United States v. Ferrara*, 458 F.2d 868 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972), this Court rejected a similar argument directed at the Taft-Hartley Act, enacted in 1959. The defendants charged with conspiracy to violate 29 U.S.C. § 186(a) (4) and (b) (1), claimed that introduction of evidence concerning their activities prior to 1959 constituted a violation of the *ex post facto* clause. This Court held that even if the earlier conduct was not criminal, the evidence was nevertheless admissible in the conspiracy which continued after that date. 458 F.2d at 874.

Field's argument is also similar to the claim, rejected by many Circuits, that the second narcotics offender statutes, 26 U.S.C. § 7237 with their enhanced penalty provisions violated the *ex post facto* clause. Since the increased penalties were not applicable until the conviction for a second offense which by definition took place after the statute's enactment, the additional punishment was imposed on future crimes and was not *ex post facto*. *Wey Him Fong v. United States*, 287 F.2d 525 (4th Cir. 1961), *cert. denied*, 366 U.S. 971 (1962); *Sherman v. United States*, 241 F.2d 329 (9th Cir.), *cert. denied*, 354 U.S. 911 (1957); *Pettway v. United States*, 216 F.2d 106 (6th Cir. 1954).

offenses under the § 1962(c) violation charged in Count One included the payments Field received in 1968-1969. This argument is specious. Under § 1961(5) a "pattern of racketeering activity" includes two or more offenses committed within a ten year period.* The Government's proof showed that the pattern of Field's racketeering activity commenced in the fall, 1968 and concluded in the fall, 1974. Field argues that "[a]s the defendant was not indicted until December, [10] 1976, these 1968 and 1969 transactions would normally fall outside of the five (5) year statute of limitations . . ." (Br. 53). The claim is effectively precluded by the fact that the jury was charged that in order to convict on Count One it had to find that at least one of the predicate offenses took place after December 10, 1971. (Tr. 1329-30).**

Field attempts to treat a § 1962(c) offense as a single act offense even though it is defined by statute as a crime that may continue for a ten year period. As Judge Lasker concluded, "The language of the Act, which makes a pattern of conduct the essence of the crime, clearly contemplates a prolonged course of conduct." *Toussie v. United States*, 397 U.S. 112, 120 (1970) (App. 19a). Essentially the argument is no different than that rejected in the context of a conspiracy charge in which the Government's

* Section 1961(5) of Title 18, United States Code, provides in part, as follows:

"Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."

** Indeed, there can be no confusion in the verdict on Count One since the jury convicted Field on Counts Two through Five, the payments on December 10, 1971, October 8 and 21, 1974 and November 12-21, 1974, respectively.

evidence may antedate the five year statute of limitations. So long as the conspiracy continues in to the permissible prosecutable period and an overt act in furtherance of the conspiracy has been committed during the five year statute of limitations, evidence of the conspiracy during the earlier period is admissible as proof of the conspiracy. *Gruenwald v. United States*, 353 U.S. 391, 396-97 (1957); *United States v. Borelli*, 336 F.2d 376, 385 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965); see *United States v. Flores*, 538 F.2d 939, 943 (2d Cir. 1976). Thus, the commission of a predicate offense during the five year prosecutable period (and after the effective date of the statute)—which the Government proved here—satisfies the statute of limitations for a § 1962(c) offense.

POINT VIII

The Government's Summation Was Entirely Proper.

As his final point on appeal, Field claims that the Government's summation contained various improper and prejudicial comments. In fact, this was a case where the Government delivered a summation which was proper in every respect, even though defense counsel's summation tested the limits of propriety.

Before turning to the specific attacks made on the Government summation, it is helpful at the outset to place these claims in their proper perspective. A reading of the summations as a whole reveals that the Government's initial summation can be fairly characterized as a model summation which explained the significance of the crime, reviewed the evidence in detail, explained how all the evidence fit together, provided reasons for believing the Government's witnesses, provided reasons for rejecting a wholly unfounded defense, and repeatedly admonished the jury to decide the case on the evidence. Virtually the entire argument was devoted to a logical analysis of all the evidence in the case. By contrast, defense counsel's

summation consisted in large part of invitations to the jury to speculate as to matters for which there was no evidence, punctuated by *ad hominen* attacks on the Government witnesses, as well as appeals to sympathy which pictured a guilty verdict to be an "axe" which would strike Fred Field down. In the face of this kind of summation, the Government's rebuttal remained well within the bounds of propriety.

Against this general background, defense counsel is hardly in a position to single out particular comments by the prosecutor and argue that they were unfair. Indeed, when at the end of the Government's rebuttal summation, defense counsel began to register objections, Judge Lasker's immediate response was to tell defense counsel that he had gone "close to the limits" and in any event he had no basis for complaint. Judge Lasker answered a specific objection made by defense counsel as follows:

"THE COURT: Let me make a general comment here, which could probably apply to what you are going to say. . . . You both have slugged very hard today, and I think you have gone close to the limits of what it's proper to do, but I must say that I think in its opening statement, the government was extremely circumspect and that defense counsel, perhaps wisely, perhaps unwisely, went very far in his explanation.

I find nothing improper in what Mr. Wing had to say in his rebuttal. If you wish to make your statement for the record, of course you should." (Tr. 1302-03).

Even though Judge Lasker thought that defense counsel was in no position to launch accusations about the fairness of the summations, on appeal defense counsel asserts that the Government's summation was unduly prejudicial. His first complaint is that the prosecutor

suggested that defense counsel did not disbelieve the Government's proof and knew the defense was groundless. The specific comment claimed to be prejudicial in this way was as follows:

"For Pete's sake. Forget this business about how it must have been Lauer who made this call. Of course, is there any proof of that. Did Mr. Lauer tell you that or did Mr. Hachmann tell you that or is there any proof from any witness anywhere that that happened?

No, that is like a lot of what Mr. Feitell told you, basically, groundless. If he wanted some proof, if he really believed that, if he really thought that that's what happened, ladies and gentlemen, do you remember Hachmann said after he got the call he called his lawyer and told him about it. Why didn't Mr. Feitell put that lawyer on the stand to explain how Hachmann mentioned that Lauer had called to tell him to 'Keep Chink Henry in mind.'" (Tr. 1296-97).

Although the argument would have been better phrased by omitting reference to defense counsel's beliefs, the prosecutor's reflex to choose that phrase was surely triggered by the defense summation which was structured around defense counsel's personal beliefs. On this particular issue, defense counsel had assured the jury, as follows:

"He says that he wrote it on 8/7/75. I don't know if he did or he didn't . . . you know, there is a lot I don't know. . . ." (Tr. 1264).

Defense counsel's assurance to the jury that he personally did not know who wrote the note became a launching pad for his further speculation, without evidence, that Lauer and not Field had made the telephone call to Hachmann at the time that the note was written. (Tr. 1264). Putting aside for a moment defense counsel's other specula-

tive arguments and references to personal beliefs, it was not unreasonable for the Government to answer the defense summation on this point alone by arguing that it was unfounded in evidence and by pointing out that notwithstanding defense counsel's expressions of lack of personal knowledge, if he really wanted proof on the issue, he could have called Tigue as a witness.* At the conclusion of the rebuttal summation, Judge Lasker correctly described these remarks as "fair comment." (Tr. 1304). See *Lawn v. United States*, *supra*, 355 U.S. 339, 359-60 n.15 (1958); *United States v. Stassi*, 544 F.2d 579, 585 (2d Cir. 1976); *United States v. Estremera*, 531 F.2d 1103, 1110 (2d Cir. 1976); *United States v. Tramunti*, 513 F.2d 1087, 1119 (2d Cir. 1975); *United States v. Santana*, 485 F.2d 365 (2d Cir. 1973); *United States v. Brawer*, 482 F.2d 117, 133-34 (2d Cir.), *cert. denied*, 419 U.S. 1051 (1974); *United States v. LaSorsa*, 480 F.2d 522, 525-26 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973).

Field's next argument is that the prosecutor sought to inflame the jury's passions. He specifically complains that the prosecutor referred to the defendant as a "crook" and the crime as a "shakedown." He further complains that the Government described this kind of crime as breeding immorality in the business world and causing slush funds. First, with respect to each of these comments, defense counsel took no objection and thereby waived any right to appellate review. See *United States v. Nemes*, 555 F.2d 51 (2d Cir. 1977); *United States v. Ong*, 541 F.2d 331, 342-43 (2d Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977). Moreover, defense counsel's failure

* It is, of course, frivolous for Field to argue that the Government is not entitled to comment on the defense's failure to call an available witness. *United States v. Bubar*, 567 F.2d 192 (2d Cir. 1977); *United States v. Rodriguez*, 556 F.2d 638, 642 (2d Cir. 1977); *United States v. Arredo-Sarmiento*, 545 F.2d 785, 793 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977); *United States v. Lipton*, 467 F.2d 1161, 1168 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973).

to object bespeaks his own recognition that, in their proper context, the remarks were not unfair argument. See *United States v. Sterling*, Dkt. No. 77-1140, slip op. 1401, 1452 (2d Cir., Feb. 2, 1978); *United States v. Canniff*, 521 F.2d 565, 571-72 (2d Cir. 1975), *cert. denied sub nom. Benigno v. United States*, 423 U.S. 1059 (1976).

Second, none of the comments was improper. Contrary to the claim in Field's brief, the prosecutor did not refer "to the defendant as a 'crook' . . ." (Br. 65). Rather, the citation used to support that accusation merely reveals a far more generalized argument that unionism is damaged when an employer is bargaining with a man who is a crook. (Tr. 1164; App. 162a). As to the references to the effects of this kind of crime in creating slush funds and damaging business morality, the prosecutor was doing no more than arguing the significance of the crime, a point which the Government has the right and the duty to emphasize. *United States v. Armedo-Sarmiento*, *supra*; *United States v. Wilner*, 523 F.2d 68, 73-74 (2d Cir. 1975); *United States v. Ramos*, 268 F.2d 878, 880 (2d Cir. 1959). See also *United States v. Clark*, 525 F.2d 314, 316 (2d Cir. 1975). Moreover, in describing the crime as a "shakedown," the prosecutor was merely employing a colloquial expression which aptly described the entire case. Defense counsel's claim that such language is prejudicial assumes that the Government should not be allowed to use dramatic phrases in arguing its case to the jury. In this regard, Judge Learned Hand's observations in *DiCarlo v. United States*, 6 F.2d 364, 368 (2d Cir. 1925) are appropriate:

"While, of course, we recognize that the prosecution is by custom more rigidly limited than the defense, we must decline to assimilate its position to that of either judge or jury, or to confine a prosecuting attorney to an impartial statement of the evidence. He is an advocate, and it is entirely

proper for him as earnestly as he can to persuade the jury of the truth of his side, of which he ought to be thoroughly convinced before he begins at all. *To shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice; it is to deny what has always been an accepted incident of jury trials, except in those jurisdictions where any serious execution of the criminal law has yielded to a ghostly phantom of the innocent man falsely convicted.*" (emphasis supplied).

Judge Learned Hand's point is particularly applicable here where defense counsel's use of language was unrestrained. Thus, for example, defense counsel characterized the Government's witnesses as "the slickest bunch of guys you are ever going to come across" (Tr. 1210); he called Hachmann a "thief" and a "liar" and he analogized him to a "rat" and an "assassin" (Tr. 1241, 1219, 1211); he called another government witness a "creep" and then pretended that his use of the word was involuntary. (Tr. 1218). Referring to the process of rendering a guilty verdict, defense counsel told the jury not to "chop down this oak, this oak of a man", not to bring down "the axe of judgment on this client I have," and not to help Hachmann "carry the axe and bring it down." (Tr. 1209, 1216, 1252). By comparison, the prosecutor's use of language was moderate indeed.

Next, Field singles out the following comment, arguing that it injected the prosecutor's veracity into the case, indirectly commented on the defendant's failure to take the stand, and went outside the record:

"There isn't a man or woman in the world who could come into the court room and take the stand and tell you that they were with Fred Field when Hachmann said he was paying him. (Tr. 1168; App. 164a)."

The basis of the attacks on this comment are difficult to find. The language does not in any way inject the prosecutor's veracity into the case. It was not couched as a first person statement and it did no more than draw on Hachmann's personal testimony that he was always alone when he was with Field. (Tr. 104-05, 159, 168, 172, 193). Moreover, the statement cannot possibly be construed as a comment on the defendant's failure to take the stand since it referred to the testimony of witnesses who would say they were *with* Field at the time of the pay-offs. Obviously, such testimony could not possibly come from Field's mouth. Finally, although this comment was based on the evidence and did not, as Field claims, come from outside the record, he is hardly in a position to complain of counsel going outside the record. Defense counsel's summation freely exceeded the record in several instances, including, most significantly, when counsel essentially swore himself as a witness and assured the jury that Field lived a moderate life style when there was not an iota of such evidence in the record and, indeed, defense counsel well knew that if Field had taken the stand, the Government would have cross-examined him about substantial cash expenditures. (Tr. 1099, 1102-05, 1230-32).

Defense counsel argues next that he was accused of fabricating a defense. In fact, the comments cited were no more than the prosecutor's entirely appropriate use in his initial summation to point up the fact that having dramatically described in his opening a "rip-off" within United Brands, defense counsel introduced no evidence to support the claim. Indeed, questions during cross-examination of Government witnesses designed to establish the theory were all answered negatively. (Tr. 580-83, 662-64, 679-88, 757-59, 785-92). Thus, the prosecutor was certainly entitled to highlight the unsupported nature of the defense when the time for summations arrived. *United States v. LaSorsa*, *supra*; *United States v. Deutsch*, 451 F.2d 98 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972).

Defense counsel's further contention that he was personally attacked is similarly unfounded. There is no basis for the statement in his brief that his name was used "sarcastically." (Br. 68). Rather, a reading of the prosecutor's summation demonstrates that references to defense counsel by name were only for purposes of identification. Again, by contrast, defense counsel felt free to use the prosecutor's name while accusing him of personally attacking defense counsel (Tr. 1200), of concocting a rebuttal case when he desperately faced the prospect of summation (Tr. 1218), and of holding back crucial exculpatory evidence (Tr. 1263), all of which accusations were wholly unfounded.

Finally, defense counsel assembles a collection of miscellaneous comments claimed to be prejudicial. For example, he argues that the prosecutor referred to his own belief in saying, "why would they be coming in here and telling me a lie about this if that's what's going on?" (Tr. 1171). This simple answer to this charge is that the question was a rhetorical one for the jurors to ask themselves, as becomes apparent from the fact that other rhetorical questions surround this one. (Tr. 1170-71). Similarly, defense counsel's complaint about the use of the word "baloney" is answered by the fact that it was used first by defense counsel in his summation. (Tr. 1209). Field further complains about the prosecutor's arguments that "it had to have happened" and "I submit to you that the evidence is overwhelming. . . ." (Tr. 1293, 1300). However, all of these comments were no more than fair argument from the evidence, as is reflected by defense counsel's own failure to object. *United States v. Canniff, supra.*

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Alan Levine

Sworn to before me this

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